



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Information Processing Services, Inc.

File: B-282220

Date: June 10, 1999

B.L. Hearn for the protester.

Roberta M. Echard, Esq., Administrative Office of the U.S. Courts, for the agency.
Jeanne W. Isrin, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

Where solicitation provision contained several payment provisions, including requirement that bidders specify two of three payment methods they would accept from public in performing contract for copy services, and protester's bid omitted the solicitation section containing the provision, agency properly determined that protester's bid failed to show agreement to material requirement, and therefore was nonresponsive.

DECISION

Information Processing Services, Inc. (IPS) protests the rejection of its bid as nonresponsive, and the consequent termination of its contract as improperly awarded, under invitation for bids (IFB) No. B-001, issued by the U.S. Bankruptcy Court for the Eastern District of Virginia for on-site photocopying and related services to the public at its divisional office in Alexandria, Virginia.

We deny the protest.

Section G.1 of the IFB, which dealt with collection of fees from the public for photocopy services, provided, among other things, that for payment the vendor was required to accept cash, money orders, and cashier's checks. It also required that the vendor accept, at no additional charge to the customer, and without any minimum order or minimum charge requirements, at least two of three additional methods of payment: (1) credit card; (2) check; or (3) customer billable accounts. The provision included two blank spaces where the bidder was to insert the two methods of the three that it would accept. The IFB required bidders to submit section G.1 with their bids. IFB § L.11(c)(iv).

Bid opening was set for 2 p.m. on January 26, 1999. IPS delivered its bid in two parts; one part was delivered by Federal Express at 11 a.m. on January 26, and the other part was hand-delivered by IPS's representative at 1:51 p.m. the same day. Bids were opened and IPS was determined to be the low bidder. However, when the procurement officer examined both of IPS's bid submissions, she discovered that neither included section G (which included section G.1). The agency requested clarification from IPS, specifically asking it to provide the two methods of payment it was willing to accept. Agency Report, exh. 5, at 3rd unnumbered page. IPS responded by transmitting by telefacsimile a copy of section G.1, with "Credit Card" and "Check" typed in the blanks. Agency Report, exh. 6, at 4th unnumbered page. The agency then determined that IPS was responsible, and made award to IPS with performance to begin on March 1. When another bidder filed an agency-level protest (regarding issues unrelated to this case), the agency examined the procurement file in detail, and determined that IPS's bid should have been rejected as nonresponsive for failure to include section G.1, and that the opportunity given to clarify the omission had been improper. The agency notified IPS on February 26 that its contract had been awarded improperly, and therefore would be terminated.

IPS maintains that its bid was responsive and that the original award was proper.

A bid, to be responsive, must constitute an unequivocal offer to provide the exact items or services called for in the IFB, so that government's acceptance of the bid will legally bind the bidder to perform the contract in accordance with all the material terms and conditions. Sillcocks Plastics Int'l, Inc., B-277549, Sept. 19, 1997, 97-2 CPD ¶ 81 at 2. It follows that an incomplete bid can be found responsive only where it unambiguously incorporates all of the material terms and conditions of the IFB. Kim's Gen. Maintenance, Inc., B-275823, Apr. 3, 1997, 97-1 CPD ¶ 128 at 3. Material terms of an IFB are those that affect the price, quality, quantity or delivery of the goods or services offered. Seaboard Elecs. Co., B-237352, Jan. 26, 1990, 90-1 CPD ¶ 115 at 4.

IPS's bid was properly rejected as nonresponsive. Aside from section G.1, the IFB nowhere imposed an obligation on the contractor to accept more than one, or any particular, method of payment. We think it is clear that the contractor's willingness to accept various methods of payment from the public could affect the accessibility of the services to the public; IPS does not assert otherwise. Given that the purpose of the contract is to provide services to the public, we agree with the agency that section G.1 was material.¹ It follows that IPS's failure to include the section in its bid (or to

¹At one point in its comments, IPS suggests that the requirement is not material. Comments, Apr. 9, 1999, attach. C, at 4th unnumbered page. However, IPS also specifically states in the same comments that the "agency is correct in its analysis that Section G.1 is a material term of the IFB." Id. at 3rd unnumbered page.

incorporate it by reference) rendered the bid, at best, ambiguous as to whether it was agreeing to the terms of section G.1 and, thus, nonresponsive; a bid that is ambiguous with respect to whether the bid represents an offer to comply with a material requirement must be rejected as nonresponsive. Marco Equip., Inc.; Scientific Supply Co., B-241329, B-241329.2, Jan. 31, 1991, 91-1 CPD ¶ 107 at 3. Thus, the agency correctly determined that IPS should not have been permitted to “clarify” its bid--the responsiveness of a bid must be determined based upon the bid itself and not on the basis of post-bid opening submissions, Seaboard Elecs. Co., *supra*--and properly terminated the erroneously awarded contract on the basis that IPS’s bid was nonresponsive. See Varec N.V.--Recon., B-247363.7, Mar. 23, 1993, 93-1 CPD ¶ 259 at 5.

IPS maintains that its hand-delivered submission to the agency in fact contained a completed section G and that, if section G was missing from its bid at bid opening, it was lost due to mishandling by agency personnel after its bid was improperly opened by the intake clerk, rather than delivered unopened to the procurement officer.

There is no dispute that the intake clerk opened the bid package a few minutes before bid opening, learned that the package was part of a bid, and then hand-carried the bid package to the bid opening room. The procurement specialist, in the presence only of the court chief financial officer (none of the bidders attended), then proceeded to open and examine bids at 2:05 p.m.² Agency Report, attach. A, at 1, attach. B, at 1. IPS concludes that the clerk’s early opening of the bid package must have led to the absence of section G, since, the protester contends, IPS put it in the envelope and it was missing at bid opening. The clerk and other agency personnel who handled the bid deny that they lost any portion of the contents, and conclude that section G was never in the envelope.

While the record contains no clear evidence establishing whether section G was included in IPS’s bid envelope when it was delivered to the agency, we think there is insufficient basis for concluding that the agency lost section G. Most persuasive in this regard, we think, is the fact that the chain of custody of the bid package and the time frame involved were short--the clerk delivered the bid directly to the bid opening room shortly after receiving it, and minutes before bid opening; thus, there was little

²The procurement officer, who is presumed to act in good faith, E.L. Enters., Inc., B-271251.2, July 22, 1996, 96-2 CPD ¶ 29 at 6 n.4, has affirmed that neither of IPS’s bid submissions contained section G, Agency Report, attach. A, at 2; we have no basis to conclude otherwise. We note that a contracting officer generally may accept a hand-carried offer that is unsealed, rather than in a sealed envelope as provided by the solicitation where, as here, the circumstances surrounding the submission of the offer do not demonstrate that other offerors were prejudiced. United Teleplex, B-237160.2, Feb. 2, 1990, 90-1 CPD ¶ 146 at 4.

opportunity for one section of the bid to have been lost. Further in this regard, while IPS states that the clerk removed the contents from the envelope (the agency denies this), it does not state that the clerk handled the documents carelessly or otherwise inappropriately, so as to raise doubt as to whether she may have lost a portion of the contents after she left the protester to deliver the bid to the bid opening room. Given these circumstances, and the protester's failure to provide any probative evidence in support of its speculation--it has provided only a copy of the section G it allegedly submitted, plus a statement by its representative who delivered the bid that it contained a completed section G--there is no basis to conclude that the agency lost section G of IPS's bid.³

In any case, even if we assume that the agency lost section G, IPS still cannot prevail. Even where a bidder has complied with the offer submission requirements, but its bid or a portion thereof has been lost after being received by the agency, the general rule is that the bidder may not then submit what is purported to be a copy of the bid, as the award of a contract based on self-serving statements as to the contents of the bid originally submitted would be inconsistent with the maintenance of the integrity of the competitive bidding system. Watson Indus., Inc. B-238309, Apr. 5, 1990, 90-1 CPD ¶ 371 at 2-3; Prestex, Inc.; Putnam Mills Corp., B-205478, B-205478.2, Feb. 17, 1982, 82-1 CPD ¶ 140 at 1-2. Even if IPS could prove that the envelope contained section G, in the absence of the original, there is no certainty that the section G presented after bid opening is identical to the section G received and lost. We have allowed award to be based on the late submission of a copy of an offer after the agency lost the original only where the record clearly established that the copy was identical to the original. Watson Indus., supra, at 3. There is no basis for such a conclusion here.

IPS asks that, if its contract is not restored, we declare it entitled to reimbursement for its start-up costs as contract termination costs. Our Office is not the proper tribunal for resolving such post-award claims between contractors and the

³We further note that, while IPS states several times in its submissions that the hand-delivered portion of its bid consisted of sections K and G of the IFB (Protest, Mar. 4, 1999, at 2; Protester's Comments, Apr. 19, 1999, attach. A, at 1st unnumbered page and attach. C, at 1st unnumbered page), the copy of IPS's submission provided by the agency contains a cover page, a pre-bid opening question and response letter, a letter from IPS to the agency, section J references, and section K. In other words, the dispute about section G is not the only discrepancy between what IPS believes it included, and what the agency appears to have received.

government; rather, this is a matter of contract administration within the discretion of the contracting agency and for review by a cognizant board of contract appeals or the U.S. Court of Federal Claims. 4 C.F.R. § 21.5(a); Fru-Con Constr. Corp., B-253882, Oct. 1, 1993, 93-2 CPD ¶ 200 at 2.

The protest is denied.

Comptroller General
of the United States